Terry Machine Co., Division of S.P.S. Technologies, Inc. *and* International Union, United Automobile, Aerospace and Agricultural Implement Workers of America (UAW), AFL–CIO, and its Local 155, Petitioner. Case 7–RC–21581

October 24, 2000

DECISION AND CERTIFICATION OF REPRESENTATIVE

BY CHAIRMAN TRUESDALE AND MEMBERS FOX AND LIEBMAN

The National Labor Relations Board, by a three-member panel, has considered determinative challenges in and objections to an election held on August 5, 1999, and the hearing officer's report recommending disposition of them. The election was conducted pursuant to a Decision and Direction of Election. The tally of ballots shows 76 for and 66 against the Petitioner, with 12 challenged ballots, a number sufficient to affect the outcome of the election.

The Board has reviewed the record in light of the exceptions and briefs, and has decided to adopt the hearing officer's rulings,[1] findings,[2] and recommendations[3] to the extent consistent with this decision, and finds that a certification of representative should be issued.

The Petitioner seeks to represent a unit of all the Employer's production and maintenance employees, tool room employees, quality control employees, and shipping and receiving employees and drivers, including those employees designated as area coordinators. The supervisory status of the area coordinators, and objections by the Employer to the prounion activities of seven of those area coordinators, are at issue here.

After conducting a preelection hearing, the Regional Director issued a Decision and Direction of Election concluding that the area coordinators should vote subject to challenge because, based on the record before him, he was unable to make a determination as to their supervisory status. The Employer filed a Request for Review of this determination with the Board. On August 4, 1999, the Board issued an Order stating that the Request for Review was denied as it raised no substantial issues warranting review.[4]

As noted above, a majority of employees voted for representation by the Petitioner. The challenged ballots, including those cast by the area coordinators, were sufficient to affect the election results. The Employer filed timely election objections reiterating its contention that the area coordinators are supervisors within the meaning of Section 2(11) and further contending that the activities of seven of those area coordinators on behalf of the Union during its organizing campaign tainted the election as well as the Petitioner's showing of interest supporting the representation petition. Additionally, the Employer contended that the Regional Director's failure to determine the status of the area coordinators prejudiced it in the election.

In his report, the hearing officer recommended that the Employer's objections be overruled and that the Petitioner be certified as the collective-bargaining representative of the employees. Assuming that the area coordinators were "low-level or line supervisors" for purposes of resolving the Employer's objections, the hearing officer concluded that the prounion activities of the seven area coordinators in question did not constitute objectionable conduct, warranting the setting aside of the election. Specifically, the hearing officer found that, when viewed in the context of what he considered to be their limited supervisory authority, the area coordinators' prounion activities were not coercive as there was no evidence of impermissible threats or promises of rewards.

[1] The Employer challenges several procedural and evidentiary rulings made by the hearing officer. After a close review of the record, we are satisfied that the hearing officer's rulings did not prejudice the Employer in the presentation of its case.

[2] In the absence of exceptions, we find it unnecessary to pass on the hearing officer's finding regarding the statements made by employee Chris Jolley to area coordinator, Donald Schaeffer.

[3] As will be discussed more fully below, the hearing officer recommended that the Employer's supervisory taint objections should be overruled. The hearing officer reasoned that if the Board adopted his recommendation regarding the Employer's objections, then the Employer's challenges to the ballots of area coordinators Robert Logan, Ernest Miles, Troy Blanton, Frankie Powell, Keith Martin, Donald Hensley, and Scott Hartwick would become moot. Under these circumstances, he assumed that in order to obtain a certification of representative as soon as possible, the Petitioner would agree for purposes of resolving this proceeding that the Employer's challenges to the ballots of the seven area coordinators should be sustained. Accordingly, he recommended that the Employer's challenges be sustained unless the Petitioner filed exceptions. In the absence of such exceptions, we adopt pro forma the hearing officer's recommendation to sustain the Employer's challenges to the ballots of Robert Logan, Ernest Miles, Troy Blanton, Frankie Powell, Keith Martin, Donald Hensley, and Scott Hartwick. In view of our sustaining the challenges to these seven ballots, the remaining challenged ballots of Adam McCallum, Tim Bickes, Donald Schaeffer, Dale Alexander, and Steve Stanton are no longer determinative.

We further adopt the hearing officer's recommendation to approve the Employer's withdrawal of Objections 5 and 6.

[4] In its Request for Review, the Employer raised, for the first time, a claim that the area coordinators may have obtained authorization cards from employees. The Employer acknowledged, however, that it had failed to gather or submit to the Regional Director any evidence in support of its claim that would require the Regional Director to conduct an administrative investigation of the showing of interest. Because the Employer failed to submit any evidence whatsoever in support of its allegations, the Board denied its request for a remand so that the Regional Director could conduct such an investigation.

Although as explained below, we agree with the hearing officer's recommendation to overrule the Employer's objections, we do not rely on his characterization of the area coordinators as "low level or line" supervisors. See *Cal-Western Transport*, 283 NLRB 453, 454 (1987), enfd. 870 F.2d 1481 (9th Cir. 1989). Rather, for purposes of our analysis, we assume that the area coordinators are supervisors within the meaning of Section 2(11) with the authority to punish and reward employees as contended by the Employer. However, we find that the prounion activities of the seven area coordinators could not have reasonably interfered with the employees' free choice to such an extent that it materially affected the outcome of the election.

The hearing officer noted correctly that the prounion activities of statutory supervisors may constitute objectionable conduct warranting setting aside the election in two situations: (1) when the employer takes no stand contrary to the supervisors' prounion activity, thus leading employees to believe that the employer favors the union; or (2) when the supervisors' prounion activity coerces employees into supporting the union out of fear of retaliation by, or rewards from, the supervisors.[5] *Sutter Roseville Medical Center*, 324 NLRB 218 (1997), cited with approval in *Millsboro Nursing & Rehabilitation Center,* 327 NLRB No. 153 (1999). Thus, Board and court precedent establish that an election is not per se invalid simply because there is evidence of prounion supervisory activity, any more than an election is considered per se invalid because supervisors have campaigned *against* the union. *Evergreen Healthcare, Inc. v. NLRB*, 104 F.3d 867, 874 (6th Cir. 1997) (denying enforcement of *Evergreen Healthcare, Inc.*, 318 NLRB 200 (1995), *Wright Memorial Hospital v. NLRB*, 771 F.2d 400, 404 (8th Cir. 1985).

It is undisputed that seven of the Employer's area coordinators were actively involved in the Union's organizing campaign along with other hourly employees. Thus, some, if not all, of those area coordinators signed and then solicited signatures from employees on the showing of interest petitions; attended organizational meetings for the Union; encouraged employees to attend meetings held by the Union; spoke in favor of the Union at the workplace and at meetings held by the Union, often in response to employee inquiries; distributed union literature; encouraged employees to support or vote for the Union; wore and distributed union paraphernalia, such as buttons and T-shirts; and signed and solicited signatures on a second petition, which sought commitments from employees to vote for the Union prior to the election.

Contrary to the Employer's contentions, we find that such activity is not coercive, nor does it have a tendency to imply retaliation or reward. As we stated in *Sutter*, supra, 324 NLRB at 219, quoting *NLRB v. San Antonio Portland Cement Co.*, 611 F.2d 1148, 1151 (5th Cir. 1980), solicitation is not objectionable where "nothing in the words, deeds, or atmosphere of a supervisor's request . . . contain[s] the seeds of potential reprisal, punishment, or intimidation."[6] Similarly, "supervisory statements endorsing the union and pointing out the possible benefits of union representation . . . are not inherently coercive and are not objectionable when made without threats of retaliation or reward."[7] Under these circumstances, such statements are "permissible expressions of personal opinion." *Wright Memorial Hospital*, supra, 771 F.2d at 405. The hearing officer found, and we agree, that there is no evidence that any of the seven prounion area coordinators gave any indication to employees that they would use their authority to punish those who failed to support the Union or to reward those that did.

In support of its objections, the Employer also relies on specific encounters between area coordinators and individual employees. We find that none of these encounters constitutes objectionable conduct warranting setting aside the election.

Employee Paul Harrington testified that on the Sunday before the election, he attended a union meeting during which Robert Logan, an area coordinator, stated that some of the area coordinators had "stuck their necks out" for the bargaining unit employees, and that the only way they, the area coordinators, would keep their jobs is if the Union was voted in. The next day, Harrington wore a "Vote No" T-shirt to work. When Logan saw Harrington, he asked Harrington, a former union supporter, what was going on and what had changed his mind about supporting the Union. According to Harrington, after hearing his answer, Logan stated, much as he had the previous day, that he hoped Harrington was "in line" because he was not going to stick his neck out anymore. Harrington also stated that Troy Blanton, another area coordinator, made a similar comment to him.

[5] Here, the hearing officer properly limited his examination to the second situation given that the Employer undisputedly took an anti-union stance and communicated its position to the employees. Thus, the record establishes that prior to the election, the Employer conducted an extensive campaign through mandatory meetings, video presentations, postings, and letters to the employees urging them to vote against the Union.

[6] Accord: *NLRB v. Hawaiian Flour Mill, Inc.*, 792 F.2d 1459, 1463–1464 (9th Cir. 1986); *Wright Memorial Hospital*, supra, 771 F.2d at 405.

[7] *Sutter*, supra, 324 NLRB at 219; see also *U.S. Family Care San Bernardino*, 313 NLRB 1176 (1994); *Sil-Base Co*., 290 NLRB 1179, 1181 (1988).

As noted by the hearing officer, the Board applies an objective test when evaluating alleged objectionable conduct and "the subjective reactions of employees are irrelevant to the question of whether there was, in fact, objectionable conduct." *Picoma Industries*, 296 NLRB 498, 499 (1989), quoting *Emerson Electric Co.,* 247 NLRB 1365, 1370 (1980), enfd. 649 F.2d 589 (8th Cir. 1981). Our focus is on the reasonableness of an employee's fears as reflected by objective facts. *Electra Food Machinery*, 279 NLRB 279, 280 (1986). We find, in agreement with the hearing officer, that Logan's statements do not constitute a threat of any kind. Further, Harrington acknowledged that he was aware that only days before Logan and Blanton made these statements, they, along with the other prounion area coordinators, had been threatened with possible job loss if they did not cease campaigning in favor of the Union and start campaigning instead against the Union. Given that Harrington did not work in the same areas as Blanton or Logan, and given further the timing of their statements in relation to the warning they had received from the Employer's management, we agree with the hearing officer that these statements do not constitute objectionable conduct.

Harrington also testified about an incident that occurred while he and fellow employee Keith Seivers were eating lunch. According to Harrington, he was wearing a "Vote No" button that day. Ernest Miles, an area coordinator and a friend, was sitting nearby, eating lunch with other employees. According to Harrington, some of those employees laughed and called Seivers and himself "quitter[s]," "ass kissers," and "brown nosers." Although Miles did not participate in the name calling, he did laugh along with the other employees. After the incident, Harrington spoke to Mike Strong, another area coordinator, and stated that he felt like an outcast and that he had lost Miles as a good friend. According to Harrington, Miles apologized after the incident and told him that how he voted was his business. Again, we agree with the hearing officer that Miles' conduct was not objectionable.

Employee Chad North, who was not a union supporter, and who often wore a "Vote No" T-shirt, testified that approximately 4 weeks before the election, he was waiting for his friend and fellow employee Brandon Hargrave to finish a conversation with Scott Hartwick, an area coordinator. Also present were fellow employees Aaron Hirsch and Jeff Marshall. According to North, Hartwick turned to him and said that if the Union got in, he, North, would be blackballed and run out of the plant.

Employee Aaron Hirsch, who overheard Hartwick make the statement, testified differently. According to Hirsch, a group of employees were talking at the beginning of the shift and North joined them. Someone, not Hartwick, teased North that he was only wearing the "Vote No" T-shirt because his girlfriend did not support the Union and then stated that he was not man enough to vote how he wanted to vote. Hirsch testified that Hartwick, who was working nearby, joined the group and stated, in a laughing manner, that if the Union got in, he would hate to see a friend get blackballed. Employee Hargrave corroborated employee Hirsch's version of what occurred.

The hearing officer concluded that Hartwick's statement to North appeared to be nothing more than a joke. Thus, the hearing officer implicitly credited the testimony of employees Hirsch and Hargrave that Hartwick told North that he would hate to see a friend get blackballed if the Union got in and nothing more. Such a statement taken in the context of the other employees' earlier comments does not constitute objectionable conduct. However, even if, as North testified, Hartwick told him that he would be run out of the plant if the Union got in, we agree with the hearing officer that this statement was isolated and de minimis and does not warrant setting aside the election.[8]

In further support of our finding that the area coordinators' conduct does not warrant setting aside the election, the record establishes that almost a week before the election, the Employer threatened the prounion area coordinators with possible job loss if they failed to cease their activities on behalf of the Union. The record is clear that the Employer's threat was disseminated to employees at an organizing committee meeting and a general union meeting.[9] Thus, the employees were aware that these area coordinators might soon be incapable of either rewarding them for supporting the Union, or punishing

[8] With respect to area coordinator Robert Logan's statement to fellow area coordinator Donald Schaeffer that signing the second petition might save his job, we find that such a statement does not constitute objectionable conduct in light of the Employer's contention, which for the purposes of this decision we are assuming to be true, that they are statutory supervisors. We also agree with the hearing officer that this statement was nothing more than an expression of Logan's personal opinion that one of the possible benefits of unionization might be job security. There was nothing inherently coercive about the statement, and Schaeffer's subjective reaction to Logan's statement is irrelevant. See *Picoma Industries*, supra, 296 NLRB at 499. As for Logan's statement to Schaeffer that he, Logan, knew that "they" would get Schaeffer sooner or later after being told that Schaeffer's tire had been flattened, even if this statement could be construed as a threat, it could not have affected the election as it was made after the election. See *Mountaineer Bolt, Inc.*, 300 NLRB 607 (1990).

[9] Indeed, we note that approximately a month after the election, the Employer made good on its threat and demoted the seven prounion area coordinators, while the area coordinators who campaigned against the Union on behalf of the Employer, became salaried employees.

them for not doing so. Moreover, less than a week before the election, the Employer sent letters to the employees disavowing the unauthorized activities of the prounion area coordinators and referring also to the unresolved issues regarding their status as supervisors. Under these circumstances, we find that the prounion conduct of these area coordinators could not have reasonably coerced the employees so as to warrant setting aside the election or dismissing the representation petition.[10] Accordingly, without resolving the issue of the area coordinators' supervisory status,[11] we adopt the hearing officer's recommendation to overrule the Employer's objections and to certify the Petitioner's representative status.

CERTIFICATION OF REPRESENTATIVE

IT IS CERTIFIED that a majority of the valid ballots have been cast for the International Union, United Automobile, Aerospace and Agricultural Implement Workers of America (UAW), AFL–CIO, and its Local 155, and that it is the exclusive collective-bargaining representative of the employees in the following appropriate unit:

> All full-time and regular part-time production and maintenance employees, including tool room employees, quality control employees, shipping and receiving employees and drivers employed by the Employer at 5331 Dixie Highway, Waterford, Michigan; but excluding office clerical employees, technical employees, confidential employees, managerial employees, temporary employees, professional employees, guards and supervisors as defined by the Act.

[10] Finally, the Employer contends that the Regional Director should have decided the status of area coordinators prior to the election. Specifically, the Employer argues that the Regional Director's failure to rule on the supervisory status of the area coordinators deprived it of its right to utilize all of the area coordinators against the Union during the campaign and left it with the "Hobson's choice" of deciding whether or not it could control the area coordinators' prounion activities without committing an unfair labor practice.

There is no general requirement that the Board decide all voter eligibility issues prior to an election. See *Cal-Western Transport*, supra, 870 F.2d at 1486–1487; *St. Elizabeth Community Hospital v. NLRB*, 708 F.2d 1436, 1443 (9th Cir. 1983); *NLRB v. Northeastern University*, 707 F.2d 15, 17 (1st Cir. 1983); *NLRB v. Doctors' Hospital of Modesto*, 489 F.2d 772, 776 (9th Cir. 1973). Here, using his discretion, the Regional Director decided that the most expeditious manner to proceed so as not to delay the election was to allow the area coordinators to vote subject to challenge and we find that, in doing so, he did not abuse his discretion. Contrary to the Employer's contentions, the record establishes, as noted above, that it was more than able to communicate its antiunion stance to the employees and that even though it waited until immediately prior to the election, it ultimately ended up taking action to control the area coordinators' prounion activity, despite their unresolved status.

[11] We note that the uncertainty that exists regarding the status of the area coordinators can be resolved through the bargaining process or through the timely filing of a unit clarification petition. See *Sutter*, supra, 324 NLRB at 219 fn. 7.